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KONSTANTINE J. DIAMOND 4010 E. 26TH STREET LOS ANGELES, CA 90023			CASTELLANO, STEPHEN J.	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 23

Application Number: 09/785,100
Filing Date: February 15, 2001
Appellant(s): APPS, WILLIAM PATRICK

Robert Brandenburg
For Appellant

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GROUP 3700

SUPPLEMENTAL EXAMINER'S ANSWER

This is in response to the appeal brief filed October 11, 2003.

Art Unit: 3727

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows:

Art Unit: 3727

- A. Whether claims 1-51 are anticipated under 35 U.S.C. 102(e) by Apps et al. (5,651,461) (Apps '461).
- B. Whether claims 15-19, 21-26, 50 and 51 are anticipated under 35 U.S.C. 102(e) by Apps et al. (5,704,482) (Apps '482).
- C. Whether claims 28-30 and 32-39 are anticipated under 35 U.S.C. 102(b) and/or 102(e) by Koefeldt et al. (5,465,843).
- D. Whether claims 1-51 are rejected under the judicially created doctrine of double patenting over claims 1-5 of U.S. Patent No. 5,979,654 to Apps (Apps '654). **This issue is withdrawn since it doesn't seem to have been proper as the motivation was not provided.**
- E. Whether claims 1-51 are rejected under the judicially created doctrine of double patenting over figures 1-12 of U.S. Patent No. D400,012 to Apps (Apps '012). **This issue is withdrawn since it doesn't seem to have been proper as the motivation was not provided.**

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-51 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

5,651,461

APPS et al.

7-1997

Art Unit: 3727

5,704,482	APPS et al.	1-1998
5,465,843	KOEFELDA	11-1995
5,979,654	APPS	11-1999
D400,012	APPS	10-1998

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-51 are rejected under 35 U.S.C. 102(e) as being anticipated by Apps et al. (5,651,461) (Apps '461).

Note that appellant has not claimed the combination of a crate and a bottle carrier (or bottle carriers).

Apps ('461) discloses a low depth nestable display crate (see Fig. 1-17) for bottle carriers (since crate holds 2 liter bottles, see Fig. 13 and 14, it is capable of holding a carrier of equal or smaller dimension such as a beverage cozy) comprising a floor (see 32 of Fig. 2) for supporting the bottle carriers; and a wall structure (see 12, 44, etc. of Fig. 1) having endwalls (see 68 of Fig. 1) and sidewalls (see 12 of Fig. 1) extending around the periphery of said floor and comprising a lower wall portion (see 12 of Fig. 1) including an exterior surface (12) along said sidewalls, the lower wall portion further including interior bottle carrier support surfaces connected to said floor (see Fig. 1, 3, 7-9), a double thickness upper wall portion (see handles 66 and Fig. 7, also thickness of pylons 58 and handles 66 shown in Fig. 1 is at least double the thickness of the lower wall, outer wall portion as shown in Fig. 3) comprising spaced tooth members (pylons 58) extending upward from said lower wall portion and defining display openings (U-shaped space

Art Unit: 3727

between pylons) between said tooth members along said sidewalls, wherein said display openings are sized to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate, and a handle bar (66) integrally molded with said tooth members (pylons 58a at corners) along said endwalls and said lower wall portion defining a cut-out (best seen in Fig. 1 and 3, the space below the handle bar is completely vacated), said cut-out providing said handle bar complete clearance below said handle bar, and complete clearance above said handle bar from a stacked crate thereabove (it may be difficult to understand what "complete clearance" is when considering that an identical crate stacked thereabove has a handle that may be located above the lower crate's handle, of course these crates may be cross stacked wherein interference from an upper crate handle would definitely not interfere with the lower handle, also the upper crate could be any crate not necessarily an identical crate or for that matter a similar crate and could include a crate without handles, note that when nested as shown in Fig. 15 (a configuration wherein identical crate handles would be at their closest) the handles would still have clearance therebetween as can be deduced by examining the relative positions and dimensions depicted by Fig. 6-8, in particular, handle height and width in the vertical direction and wall 12 height), and provide sufficient clearance between said handle bar and the bottle carriers loaded in said crate to enable a user's hand to encircle said handle bar (see Fig. 13 and 14) as stated in claim 1.

Apps ('461) discloses interior teeth panels (four alternating flat surfaces 36) provided on the interior side of said tooth members (pylons 58), said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate as stated in claim 2 (see Fig. 1).

Re claim 15, Apps ('461) discloses a low depth nestable display crate for bottle carriers comprising: a floor (see 32 of Fig. 2) having an upper surface for supporting the bottle carriers, and a lower surface; and a pair of opposed endwalls (68 in Fig. 1) and a pair of opposed sidewalls (12 of Fig. 1) extending around the periphery of said floor, the sidewalls comprising a sidewall lower wall portion (12 of Fig. 1) having an exterior surface and further having interior bottle carrier support surfaces (see Fig. 1, 3, 7-9) connected to said floor, the sidewalls further comprising a double thickness upper wall portion (Fig. 3 discloses the hollow sidewall that extends upwardly into the pylons 58) including spaced-apart sidewall tooth members (pylons 58) extending upwardly from said sidewall lower wall portion and defining display openings (U-shaped space between pylons 58) between said sidewall tooth members, wherein said display openings are size to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate, the endwalls comprising a handle bar (handle 66) integrally molded with endwall tooth members (corner pylons 58a) and an endwall lower wall portion including a cut-out (see Fig. 1), said cut-out providing said handle bar clearance below said handle bar, and clearance above said handle bar from a stacked crate thereabove, and provide sufficient clearance between said handle bar and the bottle carriers loaded in said crate to enable a user's hand to completely encircle said handle bar.

Re claim 16, Apps ('461) discloses that said tooth members (pylons 58) include interior teeth panels (flat surfaces 36) provided on the interior side thereof, said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

Re claim 28, Apps ('461) discloses a low depth nestable display crate for bottle carriers comprising: a floor having an upper surface for supporting the bottle carriers, and a lower

Art Unit: 3727

surface, and a wall structure having endwalls and sidewalls extending around the periphery of said floor and comprising a lower wall portion including an exterior surface along said sidewalls and interior portions connected to said floor upper surface (see Fig. 1), wherein the exterior surface and the interior portions are connected by at least one member (see Fig. 1-3, the pylons have lateral surfaces connecting inside and outside surfaces and the interior has ribs) extending therebetween, a double thickness upper wall portion (see Fig. 3 for hollow cavity that extends into pylons) comprising spaced tooth members (pylons 58) extending upwardly from said lower wall portion and defining display openings between said tooth members along said sidewalls, wherein said display openings are sized to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate, and a handle bar (handle 66) integrally molded with said tooth members (corner pylons 58a) along said endwalls and said lower wall portion defining a cut-out (U-shaped opening beneath handle), said cut-out providing said handle bar with complete clearance below said handle bar, and complete clearance above said handle bar from a stacked crate thereabove.

Re claim 33, Apps ('461) discloses that the interior teeth panels (36) provided on the interior side of said tooth members (58), said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

Claims 15-19, 21-26, 50 and 51 are rejected under 35 U.S.C. 102(e) as being anticipated by Apps et al. (5,704,482) (Apps '482).

Note that appellant has not claimed the combination of a crate and a bottle carrier (or bottle carriers).

Art Unit: 3727

Re claim 15, Apps ('482) discloses a low depth nestable display crate for bottle carriers comprising: a floor having an upper surface for supporting the bottle carriers, and a lower surface; and a pair of opposed endwalls (40, 42, 142, 144) and a pair of opposed sidewalls (36, 136) extending around the periphery of said floor, the sidewalls comprising a sidewall lower wall portion (portion below pylons) having an exterior surface and further having interior bottle carrier support surfaces connected to said floor, the sidewalls further comprising a double thickness upper wall portion (see Fig. 5, 11 and 15) including spaced-apart sidewall tooth members (pylons 32 and 132) extending upwardly from said sidewall lower wall portion and defining display openings between said sidewall tooth members, wherein said display openings (U-shaped space between pylons) are size to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate, the endwalls comprising a handle bar (42, 142) integrally molded with endwall tooth members (pylons in corners are considered part of endwalls) and an endwall lower wall portion including a cut-out (in Fig. 12 the entire space between the corner pylons is cut out and in Fig. 1 several cutouts are provided between the posts 40 and between posts 40 and the corner pylons), said cut-out providing said handle bar clearance below said handle bar, and clearance above said handle bar from a stacked crate thereabove, and provide sufficient clearance between said handle bar and the bottle carriers loaded in said crate to enable a user's hand to completely encircle said handle bar.

Re claim 16, Apps ('482) discloses that said tooth members include interior teeth panels (56 in Fig. 1, unlabeled in Fig. 8, 176 in Fig. 12 and 132' in Fig. 17 provided on the interior side thereof, said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

Art Unit: 3727

Claims 28-30 and 32-39 are rejected under 35 U.S.C. 102(b) and/or (e) as being anticipated by Koefeldt et al. (5,465,843). Note that appellant has not claimed the combination of a crate and a bottle carrier (or bottle carriers).

Re claim 28, Koefeldt ('843) discloses a low depth nestable display crate for bottle carriers comprising: a floor (48) having an upper surface for supporting the bottle carriers, and a lower surface (floor bottom surface 48), and a wall structure having endwalls and sidewalls extending around the periphery of said floor (see Fig. 1-6 and 14-19) and comprising a lower wall portion (226 in Fig. 16 and 326 in Fig. 17) including an exterior surface along said sidewalls and interior portions connected to said floor upper surface (see 76 in Fig. 5, 6, 14, 15), wherein the exterior surface and the interior portions are connected by at least one member (nesting rib 80) extending therebetween, a double thickness upper wall portion (see Fig. 8, 9 and 15) comprising spaced tooth members (pylons) extending upwardly from said lower wall portion and defining display openings between said tooth members along said sidewalls, wherein said display openings are sized to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate, and a handle bar (282 in Fig. 16, 382 in Fig. 17 and 482 in Fig. 18) integrally molded with said tooth members along said endwalls and said lower wall portion defining a cut-out (see space below handles in Fig. 16-19), said cut-out providing said handle bar with complete clearance below said handle bar, and complete clearance above said handle.

Koefeldt ('843) discloses that the interior teeth panels (the three flat surfaces of each stop 76) provided on the interior side of said tooth members, said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

Art Unit: 3727

Claims 1-51 are rejected under the judicially created doctrine of double patenting over claims 1-5 of U.S. Patent No. 5,979,654 to Apps (Apps '654). **This ground of rejection is hereby withdrawn since it doesn't seem to have been proper as the motivation was not provided.**

Claims 1-51 are rejected under the judicially created doctrine of double patenting over figures 1-12 of U.S. Patent No. D400,012 to Apps (Apps '012). **This ground of rejection is hereby withdrawn since it doesn't seem to have been proper as the motivation was not provided.**

(11) *Response to Argument*

It may be true that none of the applied references used in the anticipatory rejections is made specifically to hold a bottle carrier in the form of a six-pack carton. However, appellant's claims are not directed to the combination of a crate and bottle carrier in the form of a six-pack carton. Appellant doesn't broadly claim the combination of a crate and bottle carriers. Appellant's claims are much broader and are directed to the broad invention of a bottle crate intended for use with bottle carriers.

Appellant states that the prior art bottle crates are not suitable for bottle carriers but does not indicate any specific claim limitation that defines the crate of the present invention as being more suitable than the prior art bottle crates applied in the anticipatory rejections. Appellant does not consider that the term "bottle carriers" must be broadly interpreted to encompass more than the specific carrier which appellant has disclosed in the present application. Bottle carrier refers to any hypothetically designed bottle carrier including a carrier of much smaller

Art Unit: 3727

dimensions for bottles of significantly smaller dimensions or a carrier which holds only one bottle, such as a beverage cozy. There are many bottle carriers for use with multiple bottles of 1 oz. or smaller capacity which are used in chemical test kits to test ph or ammonium levels in pool or aquarium water or to perform chemical testing in a lab.

An alternate view of the prior art considers the disclosed stack of crates. The anticipatory prior art references are all nestable/stackable crates. When two or more of the crates are nested or stacked, the lower crate is deemed a crate as specified by the invention and the upper crate is a bottle carrier as specified by the invention. Each of the bottle carriers holds at least six bottles.

Response to Issue A:

Of course, a bottle carrier sized to hold six-12 oz. bottles in a 2 X 3 array would not fit in the space designed for the circumference of a two-liter bottle. However, six-1 oz. bottles in a carrier of approximately 2 in. by 3 in. dimensions would fit in the space designed for a two-liter bottle and each bottle pocket could hold a separate carrier. Also, a beverage cozy designed for a 7 or 12 oz. bottle would fit the two-liter bottle pocket.

Regarding claims 2 and 16, the pylons 58 have flat interior surfaces capable of providing lateral support to bottle carriers.

Regarding claim 22, the upper edge of pylons 58 which is directed to face the bottles is concavely curved and includes a rounded portion.

Regarding claim 27, see Fig. 3 and the plurality of ribs shown at 35 extending inwardly perpendicular from the inner surface of the outer wall.

Art Unit: 3727

Response to Issue B:

Apps ('482) has no interior columns or partitions to obstruct a six-pack carrier which holds six-12 oz. bottles in a 2 X 3 array. Apps ('482) has the space to hold 2 or 3 six-pack carriers transversely oriented with respect to the crates longitudinal axis. Apps ('482) is even more capable than Apps ('461) of holding smaller bottle carriers designed for fewer bottles or designed for bottles of smaller capacity.

Regarding claim 16, see Fig. 1, surface 56 forms a surface on the teeth panel which is flat and co-planar with the interior bottle carrier support surfaces.

Response to Issue C:

Koefeld has no interior columns or partitions to obstruct a six-pack carrier that holds six-12 oz. bottles in a 2 X 3 array. Koefeld has the space to hold 2 or 3 six-pack carriers transversely oriented with respect to the crates longitudinal axis. Koefeld is even more capable than Apps ('461) of holding smaller bottle carriers designed for fewer bottles or designed for bottles of smaller capacity.

Regarding claim 28, handle bar 282 shown in Fig. 16 may be encircled by a user's hand and/or fingers.

Regarding claim 33, panels 70 and 72 are flat and capable of providing support to bottle carriers (see Fig. 5, 8, 9, 14 and 15).

Response to Issues D and E:

Since this rejection has been withdrawn, the argument is moot.

Art Unit: 3727

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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Primary Examiner
Art Unit 3727

sjc

August 6, 2004

Conferees

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